

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MID-ATLANTIC RESTAURANT GROUP
LLC d/b/a KELLY'S TAPROOM

and

Case 04-CA-162385

ROBIN C. HELMS, AN INDIVIDUAL

David Faye, Esq.,
for the General Counsel.

Nathan Schadler, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on March 23-24, 2016. Robin C. Helms (Helms) filed the charge on October 21, 2015,¹ and the General Counsel issued the complaint on December 17, 2015.

The complaint alleges that the Respondent² discharged Helms on April 30, 2015, in violation of Section 8(a)(1) of the Act.³

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates are in 2015 unless otherwise indicated.

² The Respondent will be referred to herein as the Respondent or Kelly's.

³ The discharge of Helms is the only matter alleged to be an unfair labor practice in the complaint. The General Counsel did not make any amendments to the complaint at the trial alleging additional unfair labor practices. I indicated at the hearing that I would not consider anything to be an unfair labor practice unless it had been alleged as such in the complaint (Tr. 52-53).

⁴ The record contains an affidavit executed by Eugene Mitchell (GC Exh. 7). While this document was identified on the record, it was not introduced into evidence at the hearing. Consequently, I have not read or considered GC Exh. 7 and I order that it be stricken from the record.

FINDINGS OF FACT

I. JURISDICTION

5 The Respondent, a limited liability company, operates a restaurant (Kelly's) in Bryn
Mawr, Pennsylvania. Annually, the Respondent, in conducting its business operations described
above, receives gross revenues in excess of \$500,000 and purchases and receives at Kelly's,
goods valued in excess of \$5000 directly from points outside the Commonwealth of
10 Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce
within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Credibility of Witnesses

15 In making my findings regarding the credibility of witnesses, I have considered their
demeanor, the content of the testimony, and the inherent probabilities based on the record as a
whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this
regard, that "nothing is more common in all kinds of judicial decisions to believe some and not
20 all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing
NLRB v. Universal Camera Corp., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340
U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition,
I have carefully considered all the testimony in contradiction to my factual findings and have
discredited such testimony.

25 The General Counsel's case rests in large part on the testimony of Helms. I found Helms to
be a credible witness and rely on her testimony substantially with regard to factual findings.
Throughout the trial her demeanor reflected a sincere desire to testify truthfully and her
testimony had sufficient detail to render it reliable. Helms testimony reflected that she
30 remembered in detail the events that she described. In addition, she testified consistently on both
direct and cross-examination. In its brief, the Respondent contends that because Helms has a
financial interest in the outcome of this proceeding and her testimony, for the most part, is not
corroborated by the testimony of other witnesses, it should not be credited. The Board has long
held, however, that the uncorroborated testimony of an alleged discriminatee can constitute
35 substantial evidence in support of the allegations of the complaint when such testimony is found
to be credible and is not undermined by contradictory evidence. *Ferguson Enterprises, Inc.* 355
NLRB 1121 fn. 1 (2010); *Li'l General Stores Inc.*, 170 NLRB 867 fn. 1 (1968), enfd. in relevant
part 422 F.2d 571 (1970).

40 I found the testimony of the Respondent's main witnesses, Eugene Mitchell and Angelia
Mitchell to be generally unreliable and do not credit it to the extent that it conflicts with Helms'
testimony. As will be set forth in further detail herein, their testimony is not mutually
corroborative with respect to critical events and is generally implausible. The brief testimony of
Respondent's witness Ryan Henry, contradicts the testimony of the Mitchells regarding the
45 meeting at which Helms was discharged. In addition, as will be discussed further herein, Henry's
recall with respect to much of his testimony was very limited and I found his testimony to be

unreliable. I do not credit his testimony to the extent it conflicts with that of Helms. I will discuss the credibility of other Respondent witnesses as necessary later in the decision.

Facts

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Background

Eugene Mitchell is the majority owner of the Respondent which, as noted above, operates Kelly's restaurant. Kelly's is located in Bryn Mawr, Pennsylvania, near the Villanova University campus. Mitchell also has an ownership interest in two other restaurants, Flip and Bailey and Garrett Ale House, both of which are located approximately a mile from Kelly's. Mitchell's wife, Angelia Mitchell, is the operations manager of Kelly's. During the time relevant to the complaint, there was also an on-site manager at Kelly's. Ryan Henry was the manager at Kelly's from approximately December 2014 until the fall of 2015. Prior to that time, Kristin Lang was the manager of Kelly's. The parties stipulated that Eugene Mitchell, Angelia Mitchell, Henry, and Lang were supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

Kelly's is a full-service restaurant which employs cooks, servers, full-time and part-time bartenders, and security personnel (bouncers). The restaurant has two levels and there is a bar on each level. During the time material to the complaint there were approximately 7 to 10 bartenders employed at Kelly's. The employees at Kelly's are not represented by a union.

Helms Raises Complaints About Employee Scheduling

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Helms was hired by the Respondent as a part-time bartender in March 2014, and worked at Kelly's until she was discharged on April 30, 2015. Prior to the time that she was discharged Helms had perfect attendance record and the Respondent had never issued any written warnings or suspension to Helms.⁵ Angelia Mitchell testified that Helms was a good bartender.

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Helms testified that Thursday, Friday, and Saturday evenings, with a 5 p.m. start time were the most lucrative shifts for bartenders at Kelly's since the major part of a bartender's wages came in the form of tips and it was during those periods that there was the most volume of business. According to Helms, she would typically be notified by an email from the restaurant manager on Saturday regarding her schedule for the upcoming week beginning on Monday.

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Helms testified that she and other employees at Kelly's had concerns about the manner in which they had some been scheduled for some period of time. In this connection, Helms testified that in October 2014, she met with Kristin Lang, along with another bartender Joe Fairley, and a server Chris Healy. According to Helms, Joe Fairley raised a complaint regarding the starting time for evening shifts. Fairley indicated that as a day-shift employee he should get all of the early start times for the evening shift and that anyone who did not work on the day shift should

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⁵ Angelia Mitchell testified that in the summer of 2014, a "spotting" company reported that Helms had given away drinks for free. Mitchell testified this was contrary to the Respondent's policy and that she instructed Supervisor Kristin Lang speak to Helms about it. Mitchell testified that Lang reported Helms did not recall the incident occurring and that no further action was taken. Helms did not testify regarding this incident and I credit Angelia Mitchell's uncontradicted testimony on this point.

not get any early evening start times. Helms stated that she worked on Sundays, which was not a lucrative shift, equal to or less than a day shift, and therefore she was also entitled to some of the early evening start times. Healy indicated that he wanted to be on the bar staff as he had been at Kelly's for some time as a server. According to Helms, Kristin Lang indicated that complaining
 5 was not going to get the employees anywhere. She said that bringing in Eugene or Angelia Mitchell was not going to get the employees earlier evening starting times. Lang stated that Eugene Mitchell "would lose his shit" if the employees brought scheduling issues up to him.⁶

10 In late November or early December 2014 Helms told Lang that she was frustrated by Lang's mismanagement of the schedule. Lang told Helms that if she complained to the Mitchells about the schedule that Lang would get into trouble and that she could not handle that stress. Lang told Helms all that what happened is that she would be told to take shifts away from Helms.

15 In March 2015, Michael Bevevino, Kelly's most senior bartender, gave notice to the Respondent of his intention to leave in April 2015. In early April 2015, Angelia Mitchell began to interview new bartenders to hire because Bevevino was leaving and bartender Sarah Clark had indicated that she was also leaving her employment at Kelly's because she was graduating from college and was relocating from the area.⁷ In mid-April 2015, Angelia Mitchell hired three new
 20 bartenders including Chelsea Heyward.

According to Helm's uncontradicted and credible testimony, she spoke to Flood and Clark about their frustrations with what they viewed as an inconsistency in scheduling and talked about the effect of the newly hired bartenders on their schedules and what they could do about it.
 25 Helms, Flood, and Clark were concerned that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. The three employees were concerned that this would affect their ability to get as many hours on the prime shifts as possible before the busy season at Kelly's ended after the first week of June.⁸ (Tr. 57-59.)

30 In mid-April 2015, Helms and Flood met with Ryan Henry in the manager's office in the basement of Kelly's and brought to him the concerns regarding the schedule that Helms, Flood, and Clark had discussed previously. Helms and Flood specifically noted that with the changes in the schedule that were going to occur after Bevevino left, they wanted to make sure that senior bartenders, including the two of them, would receive the prime shifts that Bevevino worked
 35 starting at 5 p.m. on Thursday, Friday, and Saturday night. Henry indicated that he was sympathetic to their complaints but that there was nothing that he could do about it. Henry stated

⁶ Lang, Fairley, and Healy did not testify at the hearing. As discussed above, I found Helms to be a credible witness. Accordingly, I credit her uncontradicted testimony with respect to this meeting with Kristin Lang.

⁷ Clark's last day of employment at Kelly's was approximately May 17.

⁸ Helms testified that the restaurant was busy through the first week of June because of graduation parties and the Villanova alumni weekend in early June, but that after that business dropped off substantially for the remainder of the summer.

that bringing these complaints to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether.⁹

At the time of the hearing, Henry was no longer employed by the Respondent and testified on behalf of the Respondent pursuant to a subpoena. Henry testified in a vague and generalized fashion regarding this meeting. Henry initially testified he recalled that he met with Helms and Flood regarding their concerns about their schedules and shifts they would be assigned in light of Bevevino leaving. He then testified, however, that he recalled Helms and another person discussing scheduling with him but he did not remember whether it was Flood. Henry indicated that while he recalled Helms expressing concern over her schedule when Bevevino left, he could not recall whether the other bartender who was present expressed a similar concern. Henry did not specifically deny the threats attributed to him regarding the loss of shift hours or shifts altogether if complaints about the scheduling were brought to the attention of the Mitchells. I credit Helms testimony regarding this meeting as it had far greater detail. In addition, I found her demeanor while testifying regarding this issue to be convincing, while Henry's demeanor reflected uncertainty as to who he met with and what was discussed

Helms testified that in mid-April, she and Healy met with Henry in the bar area on the second floor of Kelly's. Healy stated that he had met one of the new bartenders. Healy told Henry that he wanted to make sure that as he had more seniority as a bartender, that he be given more bartending shifts before shifts were given to newly hired bartenders. Henry indicated that he could not guarantee anything. Helms told Henry that there was a general feeling of frustration among the more senior bartenders and a concern that the new hires would receive the prime shifts or be put on a shift that more senior bartenders had been regularly working, causing them to be removed from the schedule. Henry replied that he worked for the Mitchells and he did what they told him to as far as when Helms had been taken off the schedule in the past and a new employee put in her spot.¹⁰ Helms told Henry that she had drafted an email to Eugene Mitchell that indicated that she had earned better shifts because of consistent work and great performance and picking up terrible shifts in the past. Helms showed Henry the email that she had drafted. Henry told Helms that the email would not get her anywhere, that it was just going to anger Eugene Mitchell and he cautioned her not to send the email.¹¹ Helms testified that she did not

⁹ I find that this meeting occurred in mid-April 2015 rather than late March 2015 as Helms testified to. Heyward, who was called as a witness by the Respondent, began working for the Respondent on approximately April 16. Heyward testified that on her first day of training she had to go to the basement at Kelly's and briefly observed Flood and Helms talking to Henry. Heyward testified that she overheard Helms and Flood tell Henry that they did not want their schedules affected by the new employees that had been hired. This portion of Heyward's testimony partially corroborates Helms testimony regarding the substance of this meeting but establishes that it occurred in mid-April rather than late March.

¹⁰ Helms testified that she had previously lost shifts without an explanation when new employees were hired.

¹¹ At the time the Respondent maintained an employee handbook which included "Disciplinary Guidelines," stating, in relevant part:

Management retains the right to discipline, including dismissal from employment, for any behavior, whether related to job performance or otherwise, which adversely affects the reputation or business activities of the restaurants:

1. Criticizing, condemning, or complaining in a manner that affects employee morale. (GC Exh. 3, p.18.)

send the email to Eugene Mitchell.¹²

5 According to Helms uncontradicted and credited testimony, in addition to the two
meetings, discussed above that she had with Henry and other employees to discuss employee
concerns regarding scheduling, she spoke to Henry separately regarding the issue of scheduling
approximately four more times from late March until the end of April 2015. In each of these
conversations, Helms told Henry that the concern about scheduling was not hers alone, but that
10 other bartenders were nervous and unsure of their positions and that it was causing “anxiety”
among them. At one of her meetings with Henry, Helms told him that she wanted to speak to the
Mitchells about the scheduling. Helms told Henry with the new employees coming in, she
wanted to make sure that the senior employees were not going to lose prime shifts. Henry told
her not to make any complaints to Eugene Mitchell about the schedule. Henry told her that a
15 dishwasher who was also a cleaner recently have told Eugene Mitchell that he was not going to
be available for several Saturdays and, as a result, Henry was told to take that employee office
cleaning schedule in retaliation for requesting time off.

20 At the trial, Eugene Mitchell admitted that Henry told him that Helms was complaining
about shift scheduling to other employees (Tr. 159.) According to Mitchell, this occurred in the
spring of 2015, when the new employees were being hired. Mitchell denied, however, of being
aware of concerns that Helms raised to management about other employees’ shifts.

25 Eugene Mitchell also testified that at an unspecified time Helms told Eugene Mitchell
that she would like longer shifts and that he had let Henry know about this. I do not credit this
portion of Eugene Mitchell’s testimony. In the first instance, Helms testified that she never spoke
to Eugene Mitchell directly regarding her dissatisfaction with the way that shifts were scheduled
for employees. As I have noted previously, I found Helms to be a much more credible witness
than Eugene Mitchell and to the extent their testimony conflicts, I credit Helms. I also find that it
30 is implausible that Helms directly spoke to Eugene Mitchell about her dissatisfaction with the
scheduling of shifts after she had been warned by both Lang and Henry that Eugene Mitchell
would be upset if she directly approached him regarding such complaints.

35 Angelia Mitchell also admitted that she was aware of the concerns that Helms and Flood
had regarding what shifts they would have in view of the hiring of the three new bartenders on
April 9 and that both employees had expressed those concerns to Henry. (Tr. 176-177.) In this
connection, Angelia Mitchell testified that she had received an email from Henry around the time
that the new employees were hired reflecting that Helms and Flood were concerned about their

¹² Henry testified generally that he recalled that Helms raised, on at least one occurrence, concerns about the scheduling and that she wanted a particular schedule. Henry testified that he did not recall if Helms raised concerns about the schedules of other employees beyond her own. Henry testified that he had communicated with the Mitchells through email and that his interactions with them in that regard were “professional.” Henry was not asked about, and therefore did not specifically deny, making the statements attributed to him by Helms regarding what he thought Eugene Mitchell’s reaction would be to the email that Helms showed him. I credit Helms version of this meeting over that of Henry. Helms’ testimony regarding these meetings with Henry has the type of detail that renders it reliable and her demeanor while testifying regarding this event reflected certainty.

shifts. (Tr. 260-261) Mitchell also testified that each employee complained about their individual schedule and sought improvement of their own schedule.

The Bartenders' Practice at Kelly's Regarding Service

Helms testified that the service policy at Kelly's was that bartenders were not to serve anyone that was intoxicated or did not have identification. Helms also testified that there was an established practice that customers that were known not to tip, or not to tip well, were served after other customers. According to Helms credited testimony, this policy was enforced by Michael Bevevino, the most senior bartender, and the employee who would divide the tip money among the bartenders at the end of the evening.¹³ Bevevino would tell other bartenders that because a customer did not tip, he or she would be served after others were served. Helms testified that when she was working in Bevevino's area and he saw her serve people that he had indicated should be served last, he would "yell" at her for serving those customers quickly. According to Helms, there were three Villanova students who were regular customers and known not to tip. Two were males and one was an African-American female, who was known to be in a sorority.¹⁴ Helms testified that while she was sympathetic to the customers that did not tip because, for the most part they were college students who did not have a lot of money, she would comply with the practice enforced by Bevevino when he was present and serve customers known not to tip after other customers. Helms credibly testified, however, that she never refused to serve any customer unless they were intoxicated.

Helms testified that after the Super Bowl party held at Kelly's in February 2016 she had a conversation with Eugene Mitchell in which the practice regarding service to customers who do not tip, or did not tip well, came up. Mitchell asked Helms about how a couple, who were personal friends of the Mitchells and who had been at the Super Bowl party, were as guests. Helms replied that they were "nice" and that she did not have a problem the way that they tipped, but that Bevevino did not engage them and told the other bartenders to get their drinks before they left the bar area so that he would not have to do so. Helms told Mitchell that Bevevino did not interact with the couple because he felt he did not tip an appropriate amount.¹⁵

On February 15, 2015, at 1:56 a.m., a customer of Kelly's sent an email to Eugene Mitchell regarding service he received at Kelly's on the evening of February 14-15. (GC Exh. 4.) The customer's email indicated that at approximately 1:15 a.m. on February 15, a female bartender told him that he would not be served. She told him "You don't tip well enough, I work for tips, fuck you." The customer's email further indicated that "I was very upset because of the 4 drinks I previously purchased, I had tipped twice. I don't have money to tip every time, but tip every other to make sure bartenders get their pay. As I walked to another bartender, I saw the blonde woman point me specifically, and tell the other 2 bartenders not to serve me." The

¹³ All tips were pooled and were divided equally between all bartenders on duty on a particular evening by Bevevino.

¹⁴ Although Bevevino was called as a witness by the Respondent, he did not testify regarding the policy of the bartenders at Kelly's regarding the relationship between tipping and service. Thus, Helms testimony on this point is uncontradicted.

¹⁵ Eugene Mitchell testified that he did not recall having such a conversation with Helms. I credit Helms testimony regarding the conversation as it had sufficient detail to establish its reliability and her demeanor while testifying regarding this incident was convincing.

customer indicated that he was concerned that he will be treated that way future visits to Kelly's which would force him to take his business elsewhere.

On February 15, at 7:41 a.m., Mitchell responded to the customer thanking him for his letter and apologizing for his experience. The email further indicated: "There are many instances with patrons who did not tip. I will tell you that regardless of the tip the bartenders are trained and instructed to treat each patron with dignity and respect. This issue noted in your email will not be lightly taken and will be addressed today."

On February 15, at 7:50 a.m., Mitchell forwarded the customer's email to the bartenders at Kelly's, and stated in his own email: "You can certainly choose to serve at your discretion but we can't have interactions like the one described below. It will do more damage than good and generally reverberate through the community. There are some really good days ahead of us with the basketball team doing well and spring around the corner . . . I think. I know these kids can be unbearable, frustrating and rude to say the least. Be patient and please do not lash out. Take a break if you need to decompress."

Later in the morning of February 15, Sarah Clark sent an email to Eugene Mitchell stating in part, "I have a much different version of the story, and I know ultimately it does not matter, but I am still sorry. I just wanted to let you know that the content in his email is not how it actually went down." Clark indicated that she would be happy to tell Mitchell her side of the story.

On the afternoon of February 15, Mitchell sent an email to Clark indicating: "Thank you for responding. I am totally on your side and everyone that works with us. The intent on sending the email was not to call you out just to let everyone know how things reverberate on the smallest of issues. You are all good with us. I would like to hear your side and that he was belligerent or cut off would be great to document. We always get hammered for VIP and never point out when folks are cut off. Anyway, don't let this impact your day, at all. Let's make some money when we have the chance. You guys deserve it."

According to Mitchell's uncontradicted and credited testimony, he later met with Clark and told her that her behavior toward the customer was inappropriate, but that no further action was taken against her. Mitchell admitted that it is quite common in the restaurant industry that some bartenders will give better service to customers who tip better. Nonetheless, Mitchell also testified that he was not aware of Bevevino's practice while employed at Kelly's of not quickly serving customers who did not tip or, in his view, did not tip appropriately. I do not credit Mitchell's testimony on this issue because, as noted above, I find that Helms specifically advised him of it. I also find that Mitchell's testimony on this issue is implausible, given his admission that he is aware that such a practice is common in the restaurant industry. In addition, the email exchange set forth above establishes that a customer complaint regarding a lack of service because of a failure to tip was specifically brought to Mitchell's attention. Mitchell acknowledges speaking to Clark about the matter and telling her that such conduct was inappropriate. The record establishes, however, that no discipline was ever administered to a bartender at Kelly's because of a failure to serve a customer, or serve a customer promptly, because the customer did not tip, or did not tip appropriately.

Helms' Training with Heyward

Helms testified that she was assigned to train newly hired bartender Heyward on the second night of Heyward's training at Kelly's. According to Helms, she told Heyward that since Kelly's was a high-volume, quick turnover bar, typically the bartenders would first serve the customers who they knew tipped, and later serve the customers the bartenders knew did not tip. Heyward responded and that she had worked in this type of environment before and that that was the universal rule regarding service.

According to Helms, Heyward told Helms that Sarah Clark, who had trained Heyward on her first evening of work at Kelly's, told Heyward that shifts were not assigned well and that there were complaints from the staff regarding scheduling. Heyward added that as a single mother she needed a consistent schedule in order to support her son. Heyward asked Helms her opinion about whether she should stay at Kelly's, since Helms was also a mother. Helms replied that she agreed with Clark that shifts and scheduling were an issue but that she did give an opinion about what Heyward should do.

On cross-examination, Helms testified that while Helms was working with Heyward, the African-American woman who was in a sorority, came into the restaurant and Helms mentioned to Heyward that she was known not to tip and was served after others. Helms denied refusing to serve the customer. Heyward served the customer. Helms noted that on the same evening, Helms served several African-American bouncers who worked at the restaurant, who were with their wives and girlfriends celebrating a birthday.

At the time of the trial, Heyward, who is African-American, no longer worked at Kelly's and testified on behalf of the Respondent pursuant to a subpoena. According to Heyward, when they trained together, Helms told her that if newly hired employees were scheduled for earlier shifts that started at 5 p.m., Helms would be upset because she had seniority. According to Heyward, Helms complained generally about Kelly's and also told Heyward that if she was really unhappy there, Heyward should look for something else in terms of employment. Heyward responded that if it was that bad at Kelly's, she would learn that very quickly and keep moving as she had a son to care for.

Heyward testified that while she was training with Helms, two young African-American women came into Kelly's celebrating the fact that they were finishing school. Helms told Heyward that she was not going to serve them because they never tipped her. According to Heyward, Helms said that if he she wanted to wait on them she could do so but that Helms was not going to do it. According to Heyward, she waited on the two African-American women, who were there with other people. After the African-American customers had paid, Helms said to her "Let me guess, they did not tip you." Heyward responded that they did and they actually tipped well. Heyward responded that it must be because she was black also. Heyward responded that she was offended by Helms comment. Heyward also confirmed, however, that some of the African-American bouncers who worked at Kelly's came in to celebrate a birthday that evening and that Helms served them and was very nice to them.

I generally found that Heyward was not a credible witness. Her testimony was often disjointed and not cohesive. She at times indicated that her testimony was "my interpretation" of

events. As noted above, I found Helms to generally be credible and I credit her testimony over that of Heyward regarding the description of events that occurred when Heyward trained with Helms prior to their discussion of the tip left by the two African-American female customers. I also found parts of Heyward's testimony to be implausible. For example, Heyward testified that Helms told her that if she was really unhappy at Kelly's, Heyward should look for other employment. There is nothing in Heyward's testimony, however, to indicate that she had ever told Helms that she was unhappy at Kelly's. Under these circumstances, I find it implausible Helms would tell Heyward that if she was unhappy at Kelly's she should look for other employment.

However, I partially credit Heyward's testimony with respect to the discussion between Helms and Heyward regarding serving the African-American female customer, who was known not to tip. After carefully considering the testimony of both Helms and Heyward, I find that Helms pointed out the African-American female customer referred to earlier and told Heyward that she was known not to tip the bartenders. Heyward served that customer and another African-American female customer who was with her. I specifically find, based upon Helms consistent testimony on this point and the record as a whole, that Helms never refused to serve the African-American female customer, but merely indicated that the customer was known not to tip. However, after Heyward served the two African-American female customers, I find that Helms asked Heyward, "Let me guess, I bet they did not tip you" and when Heyward told her that she had been tipped well, Helms responded that it must be because Heyward is also black. While Heyward was not a particularly reliable witness, I do not believe that she would not invent those specific details. In addition, Helms was not questioned about what, if any, comments she made about the tip left by the African-American female customers and therefore did not specifically deny those statements.

On approximately April 28, Heyward spoke to Angelia Mitchell and told her that she had another job and was leaving. When Mitchell asked Heyward her reasons for leaving, Heyward responded by saying generally that she did not think she was treated well by Flood and Helms. Heyward also indicated that she felt "negative energy" from Helms because she did not have anything positive to say about Kelly's. Heyward also told Mitchell about the comments described above that Helms had made to her when she received a tip from the two female African-American customers. Heyward also asked Mitchell not to tell Helms what she had said about her. Heyward continued working for Kelly's for approximately 2 weeks after giving her notice.¹⁶

Helms' Discharge

Helms testified that on April 30, 2015,¹⁷ when she reported to work to start her shift at 5 p.m., Henry asked her to come downstairs to his office. When they arrived at the office, Angelia Mitchell was also present. Shortly thereafter, Eugene Mitchell also arrived. Eugene Mitchell had

¹⁶ I based these findings on the testimony of Heyward. I do not credit Angelia's Mitchell's testimony regarding the conversation between her and Heyward. Mitchell's testimony is not corroborated by Heyward in important respects and appears designed to buttress the Respondent's defense. I specifically discredit Mitchell's testimony that Heyward told her that Helms refused to serve the customer because she was black and that Helms was a racist.

¹⁷ I take administrative notice of the fact that April 30, 2015, was a Thursday.

a paper in his hand and said that he had listened to hours of tape and he had heard what she had said about “us” and had documented it. Eugene Mitchell told Helms that she had hurt their feelings and that they would not take that and that she was fired. Eugene Mitchell then left the office.

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Angelia Mitchell then told Helms that she was not sure if Helms knew but that when the security camera system was updated at Kelly’s, listening devices were also installed and that they had recorded Helms complaints and that it had hurt their feelings. Angelia Mitchell then turned to Henry and said that she did not think that anyone knew that listening devices had been installed and Henry merely shrugged his shoulders. Angelia Mitchell then said that Eugene Mitchell wanted to “clean house” and fire the entire staff because everybody was making the complaints. Angelia Mitchell further stated that Eugene Mitchell wanted to close for the weekend and start fresh on Monday with a new staff, and that she had to talk him out of it.

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According to Helms, Angelia Mitchell then stated that they had expected friends to come in that night and that she would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Mitchell stated although it is clear from the tapes that the complaints discussed between Helms and her coworkers had not been overheard by customers, she was concerned that they would be heard that night by her friends.

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Helms stated that while she did complain to coworkers about working conditions she had never talked to any of the guests about it and that Mitchell would not hear anything like that of the tapes because it never happened. Helms stated that she did not understand why she was being fired because she consistently showed up for work despite having two small children. Helms also noted that that she always treated customers courteously and had repeat regular customers and brought in a good amount of money. Helms stated that she was very good at her job, so why was this happening based on the valid complaints she had raised. Angelia Mitchell replied that none of that mattered to them. Angelia Mitchell stated that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

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Helms then turned to Henry and said that her complaints about the scheduling had never been specifically addressed. Helms told Mitchell and Henry that the Respondent did not have an open door policy and when she made her complaints, she was told that they were not going to be treated in the way that she wanted them to be and that she should keep them to herself. Helms told Mitchell and the Henry that she had done a good job and worked hard and that she deserved the shifts that were not being given to her. Helms stated that there was a constant “walking on eggshells” type of atmosphere at work. Helms stated that it was frustrating not knowing whether a scheduled shift would be assigned to a newly hired employee after she had made child care arrangements. Henry admitted that Helms had complained to him about shift scheduling and that he told her that her complaints were not going to be answered in the way she wanted. At that point the meeting ended and Helms went to get her personal belongings.¹⁸ While she was gathering her belongings, Flood approached her and Helms told her that she had been fired and

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¹⁸ Helms consistently denied on cross-examination that her alleged refusal to serve an African-American customer was brought up in this meeting.

that Angelia Mitchell had told her that the Respondent had recorded employees and heard them complaining and that it was very likely that Flood was on the tapes also.

Angelia Mitchell testified that after Heyward told her she was leaving Kelly's and spoke to her about Helms, Mitchell "I set up a plan to I was going to have to get her (Helms) to admit that she did not serve a black person and to get it out of her what happened without disclosing Chelsea." (Tr.269.)¹⁹ Mitchell testified that she came up with a ruse that the Respondent had listening devices at Kelly's and then Helms could not deny what happened. Angelia Mitchell testified she told Eugene Mitchell about the alleged "racist comment" made by Helms and what should be done.²⁰ Angelia Mitchell denied discussing with Eugene Mitchell Helms' complaints about scheduling in this conversation.

Angelia Mitchell testified that at the meeting held with Helms Eugene Mitchell asked Helms if she was unhappy and what was going on. She testified that Eugene Mitchell asked Helms if the "kids" and the late night "getting to you." Angelia Mitchell also testified that she and Eugene Mitchell told Helms that she had been "complaining to everyone except the two of them about the work environment, the late-night college students and her job." (Tr. 178.) According to Angelia Mitchell, Helms said she was miserable. Angelia Mitchell testified she then asked Helms if she denied service to a customer she felt would not tip. Mitchell testified that when Helms denied it, Mitchell then told Helms that she had her on tape and asked Helms again if she denied service to someone. Mitchell testified that she could not remember if she told Helms the customer was a black person. (Tr. 272) Mitchell testified that Helms finally admitted that she had not served somebody because they did not tip. According to Mitchell's direct testimony, she told Helms, "I have a lot of people that come in here that are black. And this lady happened to be black, and you said it to a black coworker." According to Mitchell, she then asked Helms what if it had been an African-American female that she coordinates functions with at the Villanova University. (Tr. 272.)²¹ According to Angelia Mitchell, Eugene Mitchell then said that "I cannot have this, you're unhappy, we're unhappy, we cannot run a business like this. You should not be working here if you're this unhappy." According to Mitchell, Helms said, "Okay" and then Eugene Mitchell left the meeting. Mitchell testified that she and her husband did not anticipate that it would end this way and that it felt like a "mutual separation." At this point, Mitchell testified she did not consider Helms an employee any longer. According to Angelia Mitchell, she then asked Helms what was going on and Helms said that she was miserable and felt like she was "walking on an eggshell every day." Mitchell further testified that Helms said she was upset about all the new hires and did not like not knowing when she was going to be scheduled.

Eugene Mitchell testified in a generalized fashion that before he met with Helms on April 30, he had received complaints from her coworkers that she was difficult to work with and that

¹⁹As noted above, I specifically discredit the portion of Angelia Mitchell's testimony in which she indicated that Heyward reported to her that Helms refused to serve a black customer and that Helms was a racist.

²⁰ Angelia Mitchell's testimony does not indicate what she discussed with Eugene Mitchell regarding what they should do with Helms prior to the meeting on April 30.

²¹ On cross-examination, however, Angelia Mitchell testified that she did not say anything to Helms about the customer being an African-American, a coworker being an African-American, or an African-American customer who the Mitchells did business with. (Tr. 351-352.)

employees did not want to work at the upstairs bar with her because she was not pleasant to be around. Eugene Mitchell also testified that he was aware that Helms raised concerns about shifts to Henry but testified that they were about her own shifts and not about other employees. Eugene Mitchell further testified to a conversation with Angelia Mitchell regarding information that she had received from Heyward regarding an African-American patron and the conversation between Heyward and Helms regarding service to that customer. Mitchell testified that he could not remember the specific statements that were relayed to him by Angelia Mitchell but that it was “definitely minority discrimination” in his mind and that they needed to address the issue with Helms. According to Mitchell, his intention was to address with Helms the specific issue that had arisen regarding service to the African-Americans patron and to also address with Helms the complaints from her coworkers that they did not want to work with her anymore.

Eugene Mitchell testified that when he arrived at Kelly’s on April 30, Angelia Mitchell, Henry, and Helms were present. When he arrived, Mitchell said to Helms that he had received complaints from her coworkers about not wanting to work with her and that she was not serving customers because she did not think that she was going to be tipped. Mitchell testified that he told Helms that there was a surveillance camera and that he and his wife had heard Helms refusing service when he and his wife listened to the audio.²² Mitchell testified that he did not bring up Heyward’s name because of her request not to do so. According to Mitchell, he asked Helms what was going on. He told Helms that it seemed like she was “burned out,” and that she may be exhausted. He said that he had been doing this for 10 and 12 years and that the “kids” could wear you down and it was late the school year and it gets difficult. According to Mitchell, Helms said “You’re right. I should have left a couple weeks ago. I can’t take it anymore.” According to Mitchell he said “Okay, I guess were done here.” Mitchell testified that he assumed that the conversation was over and that “we agreed that there was no need for her to work there any longer.” Mitchell then left the meeting, while Angelia Mitchell and Henry remained with Helms. Mitchell admitted that he did not bring up the issue of Helms allegedly not serving an African-American customer at the meeting. (Tr. 292-293)

Henry testified that on April 30 he was present in his office for the meeting between the Mitchells and Helms. On direct examination, Henry testified that there were some questions about Helms’ behavior and at one point there was discussion about “discriminatory acts regarding race.” Henry then testified “At that point when she was asked about that specific piece about race, she had agreed that she had, how do I put it, done that act, I guess.” Henry testified that Helms that the reason for Helms being discharged “was directly tied to the discriminatory act.” (Tr. 381.) On cross-examination Henry testified he did not recall anything more specific about the “discriminatory incident,” but that he did recall that her termination involved a discriminatory act based on race Henry did recall, however, Eugene Mitchell telling Helms that she was fired. Henry did not recall Helms raising at the meeting that shifts were not scheduled correctly and that employees were walking on eggshells and he did not recall Eugene Mitchell leaving the meeting early.

I credit Helms testimony regarding what occurred on the meeting of April 30 to the extent it conflicts with that of the Respondent’s witnesses. Helms testimony was detailed and

²² Mitchell testified that he lied about the presence of an audio recording in order to protect the identity of Heyward.

consistent on both direct and cross-examination and was inherently plausible. Helms demeanor while testifying reflected a sincere desire to tell the truth.

The testimony of the Respondent's witnesses is not mutually corroborative and is replete with other impairments that establish it as unreliable. In the first instance, both Mitchells admitted that they lied to Helms about having audio recording devices at Kelly's during her termination meeting. The fact that the Mitchells created an elaborate fiction regarding the installation of listening devices at the restaurant is indicative of their untrustworthiness as witnesses. I do not accept that the Mitchells wanted to keep Heyward's name out of the discharge meeting as a reasonable explanation for this falsehood. Simply not divulging Heyward's name would suffice if that was truly a concern of the Mitchells. Eugene Mitchell admitted, however, that he never even brought up the issue of Helms allegedly not serving an African Americans customer while he was in the meeting. Based on inferences drawn from the record as a whole, I find that the Mitchells concocted a false statement regarding surreptitious taping equipment at Kelly's in order to have Helms believe that her protected statements to other employees at work regarding working conditions were secretly recorded.

I find Angelia Mitchell's testimony to be internally inconsistent. Angelia Mitchell initially testified on direct exam that she could not remember if she told Helms that the customer that Helms allegedly did not serve because the customer did not tip was black. Later in her direct testimony, Mitchell testified that she told Helms that the customer was black and that Helms told a black coworker that she would not serve the customer. Mitchell then added that she asked Helms what if the black customer had been the black woman that Mitchell worked with in coordinating parties for Villanova University. On cross examination, however, Mitchell completely reversed course and testified that she did not say anything to Helms about the customer being black, a coworker being black, or a black customer the Mitchells did business with. Testimony of this type containing such a fundamental internal inconsistency is not a reliable basis on which to make factual findings.

Henry's testimony was devoid of any details and conflicted in a substantial way with the testimony of the Mitchells. As noted above, Henry testified that Helms was discharged by Eugene Mitchell for a discriminatory act based on race. The Mitchells referred to the meeting with Helms as resulting in a "mutual separation" while Henry testified that Helms was discharged by Eugene Mitchell. Henry's testimony also conflicts with that of Eugene Mitchell on whether or not the issue of race came up in the meeting.

I find that the conflicting version of events from the Respondent's witnesses too unreliable on which to base factual findings. In addition, based on the record as a whole, I find it implausible that after weeks of trying to obtain what she believed to be an appropriate schedule based on her seniority, that Helms was suddenly state that she agreed with Eugene Mitchell that she was "burned out," and that she should have left weeks and ago and could not take it anymore.

On the basis of the foregoing, I find, based on Helms' credible testimony and admissions made by the Mitchells that at the meeting held on April 30, 2015, Helms was informed by Eugene Mitchell he had listened to recordings regarding what Helms had said about the Mitchells. Both he and Angelia Mitchell told Helms that she had been complaining to everyone

“except the two of them” about the work environment and her job. Eugene Mitchell said that it had hurt their feelings and they were not going to take it and she was fired.²³

After Eugene Mitchell left the office, Angelia Mitchell then indicated that when the security system was updated, audio listening devices were also installed and had recorded Helms complaints and that it had hurt their feelings. Mitchell then told Helms that they were aware that the entire staff was complaining about working conditions and that Eugene Mitchell wanted to “clean house” and fire everyone because of it, but she had talked him out of it. Angelia Mitchell then said that they had expected friends to come in that night and would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Helms stated that while she did complain to coworkers about working conditions, she had never talked to any of the customers about it.

Helms stated she did not understand why she was being fired because she always showed up for work, and was very good at her job. Helms asked why this was happening to her based on making valid complaints. Angelia Mitchell replied that none of that mattered to them and that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

Helms then stated that she had made complaints about the scheduling of shifts and was told that they were not going to be treated in the way that she want them to be and that she should keep them to herself. Helms also reiterated her frustration regarding the scheduling of shifts, such as not knowing when you would work and having a scheduled shift allotted to a newly hired employee. Henry admitted that Helms had complained to him about scheduling and that he told her that her complaints were not going to be answered in the way that she wanted.

I also find that there was no mention made by either of the Mitchells at this meeting of Helms alleged refusal to serve an African-American customer before the meeting ended. This finding is supported by Eugene Mitchell’s admission that he did not bring up the subject at the meeting and Helms’ credible testimony. I discredit the testimony of Angelia Mitchell that the subject was raised based upon the substantial conflict between her testimony on direct examination and her testimony on cross-examination regarding this point. I also discredit the testimony of Henry that Helms was discharged because of a discriminatory act based on race because of the complete lack of detail in his testimony and the fact that it is not corroborated by any other credible evidence. I also rely on the fact that his demeanor while testifying reflected substantial uncertainty.

The Contentions of the Parties

The General Counsel contends that the Respondent discharged Helms on April 30, 2015, because she and other employees complained about shift schedules in violation of Section 8(a) and (1) of the Act. The General Counsel argues that that pursuant to the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), a prima facie case has been established that the motivation for Helms’ discharge was her protected concerted activity

²³ The record contains no documents reflecting the reasons for Helms’ discharge.

and the Respondent has not rebutted the prima facie case by establishing that it would have taken the same action against Helms in the absence of those activities.

The Respondent principal argument is that any complaints that Helms raised involved only her own “position and interests” and did not constitute protected concerted activity under the Act and that consequently her discharge was lawful. In support of its position the Respondent relies principally on *MCPc, Inc. v. NLRB*, 813 F.3d 475 (2016), vacating and remanding 360 NLRB No. 39 (2014).

The Respondent also contends that assuming that Helms engaged in protected concerted activity, the General Counsel has not established a prima facie case that such activity was a motivating factor for Helms’ discharge under the test set forth in *Wright Line*, supra. In this connection, the Respondent contends that many employees have contacted Angelia Mitchell regarding scheduling issues without being subject to retaliation. Finally, the Respondent contends that even if the General Counsel has established a prima facie case under *Wright Line*, it presented evidence that it would have taken the same action toward Helms in the absence of such activity. The Respondent contends that it lawfully discharged Helms because she made “racist statements and refused to serve African-American customers” and that she displayed a “negative attitude” that adversely affected other employees. (R. brief, pp. 28-29).

Analysis

In order to be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014).

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), the Board explained held that “to find an employee’s activity to be ‘concerted’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” Following the remand from the United States Court of Appeals for the District of Columbia Circuit, in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), the Board reaffirmed the standard regarding concerted activity that it set forth in *Meyers I* but clarified that it “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”

It is also clearly established that concerted activity is not dependent on a shared objective by the employees involved, or on the agreement of one’s coworkers with what is proposed. In addition, an employee may act partly from self-interested motivation and still be engaged in concerted activity. *Fresh & Easy Neighborhood Market*, supra, slip op. at 4, and cases cited therein. In *Worldmark by Wyndham*, 356 NLRB 765, 766 (2011), the Board held that any doubt about whether an employee’s discussion of employment conditions with an employer is concerted is removed when other employees join in that discussion At that point, the employee’s actions become “incontrovertibly concerted” under *Meyers* because at that point the actions are undertaken “with . . . other employees.” (268 NLRB at 497.)

In *Fresh & Easy Neighborhood Market*, supra, slip op. at 3, the Board noted that “The concept of ‘mutual aid or protection,’ focuses on the *goal* (emphasis in the original) of concerted activity; chiefly whether the employee or employees involved seek to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB* 5 437 U.S. 556, 565 (1978). In *Fresh & Easy Neighborhood Market*, the Board noted that it had found a broad range of employee activities regarding terms and conditions of employment to fall in the scope of mutual aid or protection. In this regard, the Board noted that it “has found that an employee who asked for help from coworkers in addressing an issue with management, does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern 10 only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees’ mutuality of interests.” Id. slip. op. at 5 and cases cited therein.

In *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. 15 denied in relevant part on other grounds, 81 F.3d 209 (D.C. Cir. 1996), the Board held that the discussions and complaints of four employees regarding schedule changes constituted protected concerted activity and their discharge for engaging in such conduct violated Section 8(a)(1) of the Act.²⁴ In finding the employees discussions and complaints to be protected concerted activity, the Board noted that changes in work schedules are directly linked to hours and 20 conditions of work - vital conditions of employment- and employee discussion of such issues were likely to lead to collective action.

Applying these principles to the instant case, it is clear that Helms was engaged in protected concerted activity when she discussed the schedule and shift changes with other 25 employees and with the Respondent’s acknowledged supervisors. Helms protected concerted activity began on October 2014 when she met with then Supervisor Lang, along with bartender Fairley and server Healey to discuss problems they had with the Respondent’s schedule.

In mid-April 2015, Bevevino’s announced departure and the hiring of new bartenders 30 spurred additional concerns about scheduling among the existing bartenders. In this connection, Helms, Flood, and Clark discussed what they viewed as inconsistent scheduling and what they could do about it. The three employees specifically discussed concerns that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday. The three employees discussed the effect this would have on their ability to obtain as many hours as 35 possible on the prime shifts before the busy season at Kelly’s ended after the first week of June.

In mid-April 2015, Helms and Flood met with Henry in the manager’s office at the basement of Kelly’s and jointly presented their concerns about the scheduling of shifts. Both employees specifically noted that with the changes in the schedule that were going to occur after 40 Bevevino left, they wanted to make sure that senior bartenders, including the two of them would receive the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. Also in April 2015, Helms and Healy met with Henry in the bar area on the second floor of Kelly’s and again raised issues regarding the schedule. Healy told Henry that since he had more seniority as a

²⁴ In denying enforcement of this portion of the Board’s order the court found that, assuming arguendo, the employees were engaged in a form of concerted activity, their conduct was not protected under the Act because it occurred in the presence of patients. 81 F.3d at 214.

bartender, he wanted to be given more bartending shifts before they were given to the newly hired bartenders. Helms noted a general feeling of frustration among the more senior bartenders and the concern that the new hires would receive the prime shifts, or be put on the shift that more senior bartenders had been working, causing them to be removed from the schedule.

In addition to the meetings that she had with other employees and Henry, Helms had approximately four other discussions with Henry about the scheduling of bartenders. In each of these conversations, she told Henry that concerns about scheduling was not hers alone but that other bartenders were unsure of their positions and it was causing anxiety among them.

It is clear that Helms discussions with Flood and Clark regarding scheduling is concerted protected activity pursuant to the Board's decision in *Aroostook*, supra. The meetings that Helms had with Lang and Henry at which other employees were present and concerns were raised by the employees regarding the scheduling of shifts constituted "incontrovertibly concerted" activity pursuant to the principles expressed in *Meyers I* and *Worldmark by Wyndham*.

The fact that at the meetings that Helms, Fairley, and Healy held with Lang in October 2014, 2014, and the meeting that Helms and Healy had with Ryan in mid-April 2015 the employees raised individual issues regarding scheduling does not detract from the fact that, on a collective basis, they were raising concerns about working condition and thus were engaged in protected concerted activity. *Fresh & Easy Neighborhood Market*, supra slip op. at 4.

I do not agree with the Respondent's position that the decision of the United States Court of Appeals for the Third Circuit in *MCPc, Inc.*, supra, requires a finding that Helms was not engaged in protected concerted activity. In *MPCc, Inc.*, 360 NLRB No. 39 (2014), the Board found that the respondent violated Section 8(a)(1) of the Act by discharging an employee for engaging in protected concerted activity. In that case during a group meeting conducted by a respondent supervisor, the participants discussed the employees' heavy workload and one employee, Galanter, urged the respondent to hire additional engineers to alleviate the work load. In support of this point, the Galanter mentioned that the respondent had hired a corporate executive at a \$400,000 salary that could have been used to hire additional engineers. Two other employees present at the meeting expressed agreement with Galanter. The Board found that Galanter engaged in protected concerted activity when discussing with other employees terms a condition of employment, pursuant to the principles set forth in *Meyers II* and *Worldmark of Wyndham*. In doing so, the Board noted that it had consistently found activity concerted when a single employee protests changes to employment terms common to all employees in front of the coworkers. The Board also noted that the discussion about employee workload's occurred at a meeting involving team building and that two other employees participated in the discussion by expressing agreement with the latter's comments. *Id.* at slip op. 1.

In its decision, the Third Circuit, after considering its own relevant precedent, including *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and that of the Board, concluded, in agreement with the Board, that Galanter had engaged in concerted protected activity. (813 F.3d 482-487.) However, the court vacated the Board's decision and remanded it to the Board for further consideration of the Respondent's defenses under *Wright Line*.

I am, of course, obligated to apply Board precedent in deciding the allegations of the complaint, *Pathmark Stores, Inc.* 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.* 273 NLRB 746, 749 fn. 14 (1984). Thus, I must apply the rationale of the Board's decision in MPCc in resolving the issues presented by the instant case. Since in its decision In MPCc, the Third Circuit agreed with the Board's analysis of whether Galanter engaged in protected concerted activity, I do not find that the court's decision in any way supports the Respondent's contention in the instant case that Helms did not engage in concerted protected activity. Accordingly, on the basis of all of the foregoing, I find that Helms was engaged in protected concerted activity when she presented employee concerns to the Respondent's supervisors regarding the scheduling of bartenders' shifts.

The Board applies the analysis of *Wright Line*, supra, to 8(a)(1) allegations that turn on motive. *Ferguson Enterprises*, supra, at 1121 fn. 3; *State Plaza Hotel*, 347 NLRB 755 (2006). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

In the instant case, as discussed in detail above, Helms clearly engaged in protected concerted activity when she raised complaints about scheduling with, and on behalf of, other employees to admitted Supervisors Lang and Henry.

With regard to whether the Respondent had knowledge of the protected concerted complaints made by Helms regarding the scheduling of the employees at Kelly's, Helms credited testimony establishes that, along with other employees, she presented scheduling complaints to both Lang and Henry. Board law is clear that a supervisor's knowledge of protected activity is imputed to the Respondent, absent credible evidence to the contrary. *State Plaza Hotel*, supra, at 755-757 (2006); *Dobbs International Services*, 335 NLRB 972, 972-973 (2001). As noted above, Lang did not testify in this matter. Henry's testimony regarding his meetings with Helms in which she presented scheduling complaints was vague and I do not credit it. In this regard, Henry testified that he recalled on at least one occurrence Helms raised concerns about her scheduling and wanted a particular schedule but he did not recall she raised concerns about the schedules of other employees. Accordingly, there is no credible evidence that Lang and Henry did not convey that Helms' complaints about scheduling were raised with, and on behalf of, other employees.

As noted above, Eugene Mitchell admitted that around the time that the new bartenders were hired in mid April 2015, he was informed by Henry that Helms was complaining about shift scheduling to other employees and that she had complained about shift scheduling to him. Eugene Mitchell denied, however, being aware of concerns that Helms raised to management

about other employees' shifts. Angelia Mitchell admitted that she was aware of the concerns that Helms and Flood had regarding the shifts they would be assigned because of the hiring of the new bartenders in mid-April 2015 and that both employees had expressed those concerns to Henry. Angelia Mitchell also admitted that she received an email from Henry at this time reflecting that Helms and Flood were concerned about their shifts. Angelia Mitchell also denied that she was aware that the concerns were anything more than each employee's complaint about their individual schedule.

I find that the Mitchells had knowledge of the protected concerted nature of Helms complaints about the scheduling of bartenders at Kelly's before she was discharged. Based on the admissions discussed above alone, I believe that there is sufficient evidence to establish the Mitchells knowledge of the concerted nature of Helms' complaints about the scheduling of shifts at Kelly's. The Board's decisions in *Meyers I*, supra, and *Worldmark by Wyndham*, establish that an employee's actions are concerted when they are undertaken with other employees. In the instant case both Mitchells admitted that they were aware that Helms undertook her activities regarding complaints about the schedule with other employees. In addition, I specifically do not credit the denials of both Mitchells that they were unaware of the concerted nature of Helms' complaints regarding the scheduling of bartenders at Kelly's as I find it implausible when I consider it in conjunction with the other evidence discussed above on this issue. In reaching this conclusion, I specifically note that the credited testimony of Helms establishes that at the April 30 meeting with Helms, Angelia Mitchell stated that she and her husband were aware that the entire staff was complaining about working conditions and that they would be mortified if their friends overheard the employees talking about their complaints regarding working conditions.

There is evidence to establish that the Respondent harbored animus regarding protected concerted complaints regarding working conditions at Kelly's. In this regard, Lang told Helms and two other employees in October 2014, when they complained to her as a group about scheduling issues, that complaining about scheduling was not going to get the employees anywhere and that Eugene Mitchell, "would lose his shit" if employees brought scheduling issues to him. In December 2014 Lang told Helms that if she complained to the Mitchells about the schedule, Lang would be told to take shifts away from Helms. In mid-April 2015, Henry told Helms and Flood that bringing their complaints regarding the scheduling of bartenders to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether. Also in mid-April, in a meeting that Henry had with Helms and Healy, Henry told Helms that sending an email to Eugene Mitchell indicating that she had earned better shifts because of her good work would not get her anywhere and was just going to anger Eugene Mitchell. Finally, at the April 30 meeting at which Helms was discharged, Angelia Mitchell told Helms that Eugene Mitchell wanted to "clean house" and fire all of the employees because of their complaints about working conditions but she had talked him out of it.

In addition to the explicit evidence regarding animus toward concerted employee complaints regarding working conditions, I note that the Respondent's handbook displays an antipathy to employee complaints about working conditions. The handbook states that an employee can be disciplined, up to and including discharge, for conduct "which adversely affects the reputation or business activities, of the restaurant. The handbook specifically lists as an example of such conduct "Criticizing, condemning, or complaining in a manner that affects employee morale."

I also draw the inference that Helms' discharge was discriminatorily motivated based on the timing of Helms precipitous discharge shortly after her series of protected concerted complaints to Henry regarding the scheduling of employees. The Board has clearly held that circumstantial evidence, such as the timing of an adverse action, supports an inference of unlawful motivation. *Mesker Door Inc.*, 357 NLRB 591, 592 (2011); *Sears, Roebuck & Co.*, 337 NLRB 443, 445 (2002).

The Respondent contends, however, that many other employees have contacted Angelia Mitchell and Eugene Mitchell about scheduling and have not been disciplined or retaliated against for doing so. In this regard, the Respondent introduced into evidence a substantial number of the emails (R. Exh. 3) from employees for the period from May 1, 2014 through the end of May 2015, that were primarily sent to Angelia Mitchell. A few were sent to Eugene Mitchell. These communications involve, for the most part, routine requests for days off, and the responses from the Mitchells. There is one email dated October 22, 2014, from Eugene Mitchell to "Kris Ale House" that involves a scheduling issue but this email involves scheduling at the "Ale house" and makes no reference to Kelly's. (R. Exh. 3. p. 61).

The Respondent also introduced into evidence a number of text messages that were sent to Angelia Mitchell's phone and her replies to those messages for the period from May 20, 2015, to March 20, 2016. (R. Exh. 4.) These messages involved matters involving the everyday operations at Kelly's. To the extent that they involve scheduling, the messages from employees reflect routine notifications such as being late work or covering the shift of another employee.

None of the emails or text messages introduced by the Respondent involved concerted protected complaints by employees regarding perceived problems regarding the manner in which the Respondent scheduled employees at Kelly's. I find that the Respondent's evidence establishing that employees sent emails an text messages to the Mitchells regarding routine matters at Kelly's is insufficient to rebut the evidence discussed above establishing the Respondent's animus toward the lodging of protected concerted complaints about scheduling.

Based on the foregoing, I find that the General Counsel has met his initial burden of persuasion and established a prima facie case of discriminatory motivation as required under *Wright Line*. I now consider whether the Respondent has met its burden to establish that it would have taken the same action against Helms, in the absence of her protected concerted activity.

In its brief the Respondent asserted that it had a lawful basis on which to discharge Helms because she made racist statements and refused to serve an African-American patron. As I have found above, there is no credible evidence that the Respondent questioned Helms about her conduct regarding that incident or that it notified her that such conduct was the basis for her discharge on April 30, 2015. In fact, Eugene Mitchell admitted that he never raised the issue of race at this meeting, let alone told Helms that this was the basis for discharge.

Under all circumstances present in this case, I find that the Respondent's reliance on Helms alleged racist comment and refusal to serve an African Americans customer is pretextual. As noted above, the credited testimony establishes that Helms merely pointed out a customer and informed Hayward that the customer, who was an African-American female, was known not to

tip. Helms did not indicate that she would not serve the customer. After Heyward served that customer and her companion, another African-American female, Helms asked Heyward if she had received a tip and when Heyward indicated that she did and that it was a good one, Helms replied that it must be because Heyward is also black.

Rather than investigate the circumstances of this incident regarding the service to the African-American customer and comments made by Helms to Heyward about the tip that he would receive, the credited evidence establishes that the Respondent abruptly terminated Helms and never raised this incident with Helms when she was terminated. As further support for my conclusion that this asserted reason for Helms discharge is pretextual. I note the record clearly establishes that the practice of not serving a customer quickly because the customer was known not to tip was well known to the Mitchells. In addition, the manner in which, Eugene Mitchell addressed the customer complaint that bartender Sarah Clark refused to serve the customer because he failed to tip, establishes that the Respondents' normal approach to such a situation is to give the employee involved an opportunity to give an explanation regarding the circumstances of such an incident.

The Respondent also argues that it lawfully discharged Helms because she displayed a "negative attitude" that adversely affected other employees. I also find that the Respondent's reliance on this asserted reason for Helms discharge is pretextual. There is again no credible evidence that the Respondent ever advised Helms of any complaints that other employees had made about working with her prior to her discharge in order to give her an opportunity to address such complaints.. There is also no credible evidence that she was advised that a complaint by coworkers about her was a reason for her discharge on April 30.

The Board has held that the failure to tell an employee the asserted reason for an adverse employment action is a factor to be considered in determining whether an employer has established a valid defense under *Wright Line*. *D & F Industries*, 339 NLRB 618, 622 (2003). The Board has also found that an employer's failure to conduct a fair and full investigation and give an employee the opportunity to explain his or her actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995), *enfd.* 106 F.3d 41 (6th Cir. 1996).

In the instant case, the evidence convinces me that the incident involving the service to the African-American female customer and the comments made by Helms to Heyward regarding why Helms believed that Heyward received a tip played no role in the decision to discharge Helms. Rather, it is a pretext designed to mask the Respondent's discriminatory motive. I further find that the Respondent's claim that it lawfully discharged Helms because she displayed a negative attitude that adversely affected other employees is also pretextual. On the basis of the foregoing, I find that the Respondent has not met its burden to establish under *Wright Line* that it would have discharged Helms if she had not engaged in protected concerted activity. Accordingly, I find that the Respondent discharged Helms because of her protected concerted activities in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Robin Helms on April 30, 2015, the Respondent has engaged in unfair

labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Robin Helms, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, the Respondent must compensate Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom, Bryn Mawr, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity in order to discourage employees from exercising their rights under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer employee Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Robin Helms whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Robin Helms in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bryn Mawr, Pennsylvania, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., June 13, 2016.

5

A handwritten signature in black ink, reading "Mark Carissimi". The signature is written in a cursive, slightly slanted style.

Mark Carissimi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities on behalf of, or in support of, your fellow employees regarding wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Helms whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Robin Helms, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MID-ATLANTIC RESTAURANT GROUP LLC
d/b/a KELLY'S TAPROOM
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

www.nlr.gov.
615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-162385 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE.